Supreme Court, U.S.
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In The
Supreme Court of the United States

LEONARD F. JOBE,

Petitioner,

v.

CITY OF CATLETTSBURG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does an ordinance criminalizing the placement of any leaflet under a car's windshield wiper without the owner's prior written consent – even if the owner or driver is willing to receive the leaflet – violate the First Amendment's Free Speech Clause?

PARTIES

The parties to the proceeding in the Sixth Circuit are contained in the caption. They are Leonard F. Jobe, Petitioner, and City of Catlettsburg, Respondent.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit [App. 1-25] is reported at 409 F.3d 261 (6th Cir. 2005). The opinion of the United States District Court for the Eastern District of Kentucky [App. 27-44] is unreported.

JURISDICTION

The Court of Appeals entered its judgment on May 6, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const., Amend. I.

"It shall be unlawful for any person to place or deposit or in any manner to affix or cause to be placed or deposited or affixed to any automobile or other vehicle or other automotive vehicle, any handbill, sign, poster, advertisement, or notice of any kind whatsoever, unless he is the owner thereof, or without first having secured in writing the consent of the owner."

Catlettsburg City Ordinance § 113.05.

STATEMENT OF THE CASE

Proceedings Below

This is an action for declaratory and injunctive relief under 42 U.S.C. § 1983, challenging an ordinance prohibiting the placement of leaflets under a car's windshield wiper. The district court had original jurisdiction under 28 U.S.C. § 1331 and the appeals court had jurisdiction under 28 U.S.C. § 1291.

On June 24, 2002, Petitioner Leonard F. Jobe (Jobe) filed suit, challenging Catlettsburg City Ordinance § 113.05 (the Ordinance), which prohibits the placement of leaflets under car windshield wipers. [District Court Record No. (R.) 1: Complaint.] After taking limited discovery, the parties filed cross-motions for summary judgment. On January 26, 2004, the district court issued its memorandum opinion and order granting Catlettsburg's summary judgment motion and denying Jobe's motion. [App. 26-44.]

From this adverse final judgment, Jobe filed his timely appeal. On May 6, 2005, the United States Court of Appeals for the Sixth Circuit issued its opinion affirming the judgment. *Jobe v. City of Catlettsburg*, 409 F.3d 261 (6th Cir. 2005) [App. 1-25].

Statement of Facts

Jobe serves as the Commander of American Legion Post 224 in Catlettsburg, Kentucky. [R.1: Complaint, ¶ 5.] Catlettsburg's population is under 2,000 people. *Jobe,* 409 F.3d at 262 [App. 2a]. Jobe occasionally distributes leaflets on behalf of the American Legion Post, himself, or

both. [R.1: Complaint, ¶ 6.] Jobe has found that one of the most efficient, cost-effective means of distributing these leaflets is for him to place them securely under the windshield wipers of cars parked on public property. [*Id.*, ¶ 7.] In other words, Jobe leaflets at a time when and place where he can reach the greatest number of citizens in a short time period – by delivering leaflets to cars parked on Catlettsburg's downtown streets – rather than driving from rural homestead to rural homestead, or waiting to encounter citizens who have come to town.

Catlettsburg has a city ordinance that prohibits the placement of leaflets under a car's windshield wiper. [*Id.*, ¶ 10; R.2: Answer, ¶ 1 (admitting allegation).] The Ordinance provides:

> It shall be unlawful for any person to place or deposit or in any manner to affix or cause to be placed or deposited or affixed to any automobile or other vehicle or other automotive vehicle, any handbill, sign, poster, advertisement, or notice of any kind whatsoever, unless he is the owner thereof, or without first having secured in writing the consent of the owner.

[R.1: Complaint, ¶ 10; R.2: Answer, ¶ 1 (admitting allegation).] The Ordinance was enacted in 1952. [R.26: Deposition of Mayor Hensley, p. 10.] Catlettsburg's mayor remembers it being enforced only once, against Jobe. [*Id.*, pp. 13-14.] Although Catlettsburg seeks to justify the Ordinance as a means to reduce littering, Mayor Hensley acknowledged that the ban on leaflets under car windshield wipers "really did not enhance" the City's anti-littering efforts, [*id.*, pp. 16-18]; moreover, no car owner has complained to him about leaflets and he knows of no

such complaints to city council members or the chief of police. [*Id.*]

ARGUMENT

This Court should issue a writ of certiorari to resolve a direct conflict between the Eighth and Sixth Circuits on this important free speech question. The Court also should issue the writ because of the importance of protecting the rights of persons seeking to distribute leaflets cheaply and efficiently.

I. THE COURT SHOULD RESOLVE A DIRECT CIRCUIT SPLIT.

The Catlettsburg ordinance upheld by the Sixth Circuit in *Jobe* is virtually identical to ordinances struck down by the Eighth Circuit in *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1215 (8th Cir. 1998), *cert. denied*, 527 U.S. 1037 (1999). The *Krantz* ordinances provided:

> SECTION 3. It shall be unlawful for any person to place or deposit any commercial or non-commercial handbill or other hand-distributed advertisement upon any vehicle not his own, or in his possession, upon any public street, highway, sidewalk, road, [or] alley within the City of Van Buren providing, however, that it shall not be unlawful upon any such street or other public place for a person to hand out and distribute to the receiver therefor, any handbill to any occupant of the vehicle that is willing to accept it.

Id., 160 F.3d at 1216 (quoting Van Buren, Ark., Ordinance No. 5-1983).

Krantz involved three identical Arkansas town ordinances. The Eighth Circuit declared the ordinances overbroad and thus facially invalid because they were not narrowly tailored to serve a significant government interest. *See Krantz*, 160 F.3d 1214. The Eighth Circuit recognized that the government must establish a "reasonable fit" between the asserted goal and the means chosen to accomplish it. *Cincinnati v. Discovery Network*, 507 U.S. 410, 416-417 (1993) (holding that the city did not establish a reasonable fit between safety and aesthetics and a selective ban on news racks containing commercial publications). The *Krantz* court concluded that despite citizen complaints about leaflets left on cars and the fact that the ordinances were enacted to prevent littering, the cities had not established a sufficient basis for "concluding that a cause-and-effect relationship actually exists between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the defendant cities." *Krantz*, 160 F.3d at 1222. Thus, although the government need not choose the least restrictive means of regulation, it may not curtail substantially more speech than is necessary to accomplish its goal. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The Eighth Circuit deemed the *Krantz* ordinances to violate this well-established constitutional standard. *See also City of Akron v. Molyneaux*, 760 N.E.2d 461, 467 (Ohio App. 2001) (following *Krantz*); *Deida v. City of Milwaukee*, 176 F.Supp.2d 859, 870 (E.D. Wis. 2001) (citing *Krantz* approvingly).

The *Krantz* court also found *Schneider v. New Jersey*, 308 U.S. 147 (1939), helpful in its analysis (although not directly on point). *See Krantz*, 160 F.3d at 1219. In *Schneider*, this Court held that the governmental interest in

preventing litter was insufficient to justify an ordinance prohibiting individuals from handing out literature door-to-door. *See Schneider*, 308 U.S. at 163 ("The public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution").

Schneider further noted that a city has the power to punish individuals who throw leaflets on the ground, as opposed to those who distribute leaflets. *Id.*, 308 U.S. at 151. *See also Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 72 (1983) ("The 'journey from mailbox to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned'") (citations omitted).

Both the *Krantz* ordinances and the Catlettsburg Ordinance generally ban the placement of leaflets on cars, with the limited exception in *Krantz* where a vehicle occupant willingly accepts the leaflet, and in Catlettsburg where the leafleter owns the car or has written consent of the owner to affix a leaflet. The *Krantz* ordinance did not survive judicial scrutiny despite its exception because the ordinance generally assumed that people do not wish to receive leaflets on their cars and that there is no audience interested in the information. *Id.*, 160 F.3d at 1222. The Eighth Circuit deemed these presumptions unconstitutional under *Martin v. City of Struthers*, 319 U.S. 141, 143-44 (1943).

Catlettsburg's Ordinance makes the same presumptions. Catlettsburg punishes the leafleter who deposits a leaflet without written consent even though, despite the absence of consent, the recipient is willing to receive the information. *See Martin*, 319 U.S. at 143 (free speech